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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 85-1-00295 CFX
SHORT TITLE Los Angeles, et al. DOCKETED: Aug 21 1985
VERSUS Kling, Mary L.

Date	Proceedings and Orders
Aug 21 1985	Petition for writ of certiorari filed.
Sep 25 1985	DISTRIBUTED. October 11, 1985
Oct 4 1985	Brief of respondent Mary King in opposition filed.
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	Petition GRANTED. Judgment REVERSED. Anderson v. Bessemer City, 470 U.S. ..... (1985). Dissenting statement from summary disposition by Justice Marshall. Dissenting opinion by Justice Stevens. Justice Brennan dissents from the Court's summary reversal substantially for the reasons stated by Justice Stevens. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

85-295

Supreme Court, U.S.
FILED
AUG 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARY L. KLING,

Respondent,

vs.

COUNTY OF LOS ANGELES, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals for the Ninth Circuit exceed its authority under Federal Rule of Civil Procedure 52 in setting aside as "clearly erroneous" the findings of fact and resultant conclusions of law of the District Court,* which found that petitioners had not discriminated unlawfully against respondent by denying her admission to the Student Nursing Program of the Los Angeles

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* In its original memorandum opinion filed June 18, 1985 (see Appendix B), the Court of Appeals went so far as to direct that the original trial judge, Lawrence T. Lydick, conduct none of the proceedings for which the case was remanded. While finding neither "personal bias" nor implying any "personal grievance" against Judge Lydick, the Court of Appeals challenged, inter alia, his findings that the testimony of the plaintiff, particularly on the issues of her physical and mental disability, was not credible. However, on July 16, 1985 the Court of Appeals, sua sponte, withdrew its prior memorandum and mandate and issued a new memorandum (see Appendix A) deleting the references to and directions for removal of further jurisdiction from Judge Lydick.

County Medical Center School of Nursing ("the School") simply because of her having Crohn's disease, where the evidence at trial was that:

> (1) In addition to learning, from his review of the data submitted by respondent and her physician, that respondent has Crohn's disease, the School's Student Health Physician also made other inquiries before acting on respondent's application, and discovered that:
>
> (a) Respondent had been hospitalized for flareups of Crohn's disease at least three times within the year prior to her application, and
>
> (b) At the time of her application, respondent was

taking corticosteroid medication for Crohn's disease; and

(2) The School's Student Nursing Program is unusually demanding both physically and emotionally, compared with other nurse training programs, and can expose student nurses to contagious and infectious diseases;

(3) Flareups of Crohn's disease can be aggravated by stress;

(4) Corticosteroid medication can lessen resistance to disease and infection; and

(5) Respondent failed to show that she qualified at the required thirteenth grade level on a mathematics section of her entrance examination?

PARTIES

Petitioners are the County of Los Angeles; the Los Angeles County Medical Center School of Nursing ("the School"); Gerald C.Crary, M.D., as head of the School's Admissions Committee; Mary Duncan, R.N., as the School's Registrar and head of recruitment; Foteen O'Connor, as Chief Administrative Director of the School; and Paul Drozd, as Deputy Administrative Director of the School. Mary L. Kling, an individual applicant for admission to the School, is the sole respondent.

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No._____

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

MARY L. KLING,

Respondent,

vs.

COUNTY OF LOS ANGELES, et al.,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, and each of them, respectfully pray that a writ of certiorari issue to review the judgment and revised memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 16, 1985.

PRIOR OPINIONS

Appendix A hereto contains a copy of the revised, unpublished memorandum opinion of the Court of Appeals, of which petitioners seek review.

Appendix B is the memorandum opinion originally filed by the Court of Appeals on June 18, 1985, and subsequently withdrawn by order filed July 16, 1985.

The Court of Appeals wrote a published opinion, Kling v. County of Los Angeles, et al., 633 F.2d 876 (1980), in an earlier injunctive phase of this matter, a copy of which appears as Appendix C.

The findings of fact and conclusions of law of the District Court, based on the evidence presented at trial, constitute Appendix D.

GROUND FOR JURISDICTION

The revised judgment of the Court of Appeals for the Ninth Circuit was entered July 16, 1985. This petition was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

Federal Rule of Civil Procedure 52(a) states in pertinent part:

> "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial judge to judge of the credibility of the witnesses...."

STATEMENT OF THE CASE[1/]

In February, 1979, respondent, who has Crohn's disease, applied for admission to the

---

1/ See p. 4.

School's Student Nursing Program. In April, 1979, by mistake, respondent was given a letter unconditionally accepting her application, even though her score on a mathematics portion of the entrance examination was deficient, and even though she had not been cleared for admission by the School's Student Health Physician, Gerald C. Crary, M.D. (RT 332, 336-337, 346-347, 380, 381, 386, 390.) In an interview on April 20, 1979, the School's Registrar, Mary J. Duncan, told respondent that her acceptance was actually conditional on her presenting evidence of tutoring and testing to establish the requisite thirteenth-grade level of proficiency in mathematics concepts and problems, and on

---

1/ The Reporter's Transcript of the trial will be cited in parentheses as "RT" plus the applicable page numbers in the trial transcript.

The Clerk's Transcript will be cited in parantheses as "CT" plus the applicable page numbers.

her passing the physical requirements. (RT 41-42, 360.) At a subsequent orientation, respondent was again reminded to submit evidence of improvement in mathematics, and the required data as to her physical condition. (RT 366.) Respondent admittedly did not provide any further evidence of her qualification in mathematics. (RT 104.)

On June 11, 1979, the Registrar notified respondent that she was not accepted for admission to the Student Nursing Program because of her "physical status at the time." (RT 61.)

After making various informal attempts to have the rejection of her application reconsidered (RT 62, 64, 202-203, 292-293) respondent brought this action under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794) and 28 U.S.C. Sections 1331(a), 1343(4), 2201 and 2202, and 49 U.S.C. Sections 1983, 1985(3) and 1986.

Prior Injunction Proceeding

Respondent moved for declaratory and injunctive relief requiring her admission to the School for the spring semester. When the District Court denied her motion, she appealed to the Court of Appeals for the Ninth Circuit ("the Ninth Circuit") which directed the trial court to grant a preliminary injunction mandating her admission to the School in its January, 1981, class. Kling v. County of Los Angeles, et al., 633 F.2d 876 (1980).

On the basis of the affidavits and depositional evidence filed in the injunction phase of the case, the Ninth Circuit concluded that the School's main fear was not that respondent would be unable to meet its requirements, but that her condition would require her to miss too many classes -- a contingency denied by her personal physician -- and that:

> "...The School assumed that merely because [she] has Crohn's disease,

> her health was not sufficiently sound and stable to successfully complete the program even though Dr. Crary, the head of the admissions committee, indicated that if [she] had been evaluated on an individual basis the School would have allowed her to enroll...." 633 F.2d at 879.

Respondent never actually enrolled in the School. By the time of the Ninth Circuit's decision directing injunctive relief, she was already in nurses' training at Pierce College. Had she transferred to the School, its one-year attendance requirement would have delayed her completing training by six months. She preferred to avoid that delay. (RT 122.) She finished her training at Pierce College, passed the examination to become a Registered Nurse in July, 1981, and began the practice of nursing in September, 1981. (RT 108-109.)

This action was tried in the District Court for the Central District of California on January 25-28, 1983, before the Honorable Lawrence T. Lydick.

Trial

Testimony of Respondent:

Respondent testified that she has Crohn's disease, an inflammatory bowel disease which, in her case, manifests itself in irregular, unpredictable flareups of headache, nausea, vomiting and abdominal discomfort due to the obstruction of the passage of food through, and the absorption of food in her bowels. (RT 23-25.) She stated that stress can cause a flareup of her condition. (RT 97.) She had had occasional flareups while in college. (RT 98-99.)

Respondent realized that her "physical forms" in connection with her application to the School could not be processed until her Rubella titer, which concededly had been filed late, had been submitted (RT 107-108), indicating that she must have realized that the letter admitting her unconditionally to the School was in error.

Respondent acknowledged that she had not listed all of her hospitalizations due to Crohn's disease on the Medical history form which she and her personal physician had completed (defendants'/appellants' Exhibit 104a); and that the form's inquiry about any history of difficulties in sleeping or concentrating, taking sleeping medication or receiving psychiatric treatment had been answered negatively, even though she had been referred, in October of 1978, to a psychiatrist who had prescribed amitriptyline for episodes of shaking, sweats and difficulties in sleeping and concentrating. (RT 100-101, 112-117.)

Testimony of Dr. Crary:

Dr. Crary, the School's Student Health Physician, testified that he had treated the School's student nurses for work-caused stress (RT 211-212) and that the School's student nursing program was unusually rigorous

compared to the nurse training offered elsewhere. (RT 135.) Student nurses at the School must deal with the most difficult kinds of patients -- drug overdose, dirty, etc. -- with little supervision. (RT 190, 213-214.)

Upon examining the medical history, report of medical examinations, and laboratory reports submitted by respondent and her physician, Dr. Crary was concerned to note that the documents revealed three hospitalizations of respondent for Crohn's disease. They also disclosed that respondent was taking prednisone as well as variable amounts of corticosteroids to control inflammation, and that she had had an ileostomy to relieve her condition. In addition, the X-ray report submitted indicated that it had been made while respondent was hospitalized for a bowel obstruction. Yet Dr. Crary decided to make no adverse determination on the documents,

themselves, but to talk with respondent's personal physician, Marvin Earl Ament, M.D. (RT 132-135.)

According to Dr. Crary, Dr. Ament told him that respondent was a "wonderful person" wholly motivated to become a nurse. (RT 136.) Dr. Ament would not say definitely whether respondent had a "reasonable chance" of completing the School's program, but reiterated three times, "I think she deserves a chance." He conceded, however, that it would be a good idea if Dr. Crary advised respondent to attend a less strenuous and rigorous training program than that offered by the School. (RT 135-136.)

Dr. Crary testified that the major factors causing him to deny respondent's admission to the School on physical grounds were the three previous hospitalizations which her history disclosed and his conversation with Dr. Ament. (RT 178, 222-223.)

In response to hypothetical questioning, Dr. Crary admitted that he might have reached a different decision if he had known, for example, that respondent chose the times of her hospitalizations so as to minimize or avoid missing classes. Neither respondent nor Dr. Ament had supplied such information, however. (RT 155-158, 178.)

Dr. Crary further stated that steroid medications can reduce patients' ability to resist general infections (RT 179) and that amitriptylene is an anti-depressant often used for severe psychiatric conditions. (RT 221-222.)

Dr. Crary testified, in summary, that he had rejected respondent's 1979 application because he thought that respondent would not be able to complete the School's rigorous nursing program and might impair her health. (RT 223.)

Testimony of Dr. Ament:

Dr. Ament also testified. He is a specialist in pediatrics and pediatric gastroenterology at UCLA, and has treated some 250 patients for Crohn's disease and ulcerative colitis. (RT 264, 269.) He helped provide respondent's medical history for her application to be admitted to the School. (RT 2[illegible], 286.) He understood that the medical history form called only for respondent's health status at the time of application. (RT 278-279.)

He conceded that respondent's form did not disclose a seven-day hospitalization. (RT 313-314.) He also acknowledged that an eight-day hospitalization disclosed on the form as taking place within the year prior to respondent's application was unusually long for her. (RT 312-313.)

Dr. Ament admitted talking with Dr. Crary about respondent's application. (RT 286-288.)

Dr. Ament testified that flareups of Crohn's disease are predictable, but that respondent's flareups are not. (Compare RT 270-271 with RT 296-297.) He acknowledged that respondent takes corticosteroid medication for her condition, as well as amitriptylene. (RT 272, 304-305.) He contradicted his client, as well as Dr. Crary, in opining that there is no medical proof that stress causes flareups of Crohn's disease. (RT 288-289, 297, 311.)

Decision of the District Court

The findings of the District Court (Appendix D), inter alia, included determinations that the episodes of respondent's Crohn's disease are unpredictable and can require hospitalization (paragraph 4); that respondent was late in submitting her medical data to the School (paragraph 8); that Dr. Crary, in addition to reviewing that data,

also consulted Dr. Ament and other specialists (paragraph 10); that respondent's most recent hospitalization, at or about the time she completed her medical history form, was unusually long for her (paragraph 10); that she was receiving steróid medication and had received psychiatric treatment (paragraph 10); that the School's training program was "...both physically and emotionally demanding and stressful" (paragraph 11); that Dr. Crary had rejected respondent's application for health reasons (paragraph 12); that persons suffering from Crohn's disease or other chronic disabilities are not automatically denied admission to the School, but will be admitted if their disabilities are sufficiently under control and do not prevent full participation in training (paragraph 14); and that respondent failed to present to the School evidence of any remedial work in mathematics (paragraph 7). Finding No. 21 questioned

the credibility of respondent's testimony. The District Court concluded that respondent had not been denied admission to the School simply because she has Crohn's disease (Conclusion 4, 6 and 7).

Memoranda of the Court of Appeals

In its original memorandum reversing the trial court, the Ninth Circuit concluded that the trial had not produced evidence substantially different from that presented in the earlier proceeding for injunctive and declaratory relief, and that Dr. Crary had not evaluated respondent on an individual basis. It remanded the case for assessment of damages and attorney fees, but ordered that the trial judge not conduct those proceedings. In its revised memorandum, the order relieving Judge Lydick from the case was deleted by the Ninth Circuit.

REASON FOR GRANTING THE WRIT

THE TRIAL COURT'S FINDINGS AND CONCLUSIONS ARE BASED ON SUBSTANTIAL EVIDENCE ADDUCED AT TRIAL WHICH WAS MATERIALLY DIFFERENT FROM THAT PRESENTED IN THE EARLIER INJUNCTION PROCEEDING, AND ARE NOT CLEARLY ERRONEOUS.

In Anderson v. Bessemer City, 470 U.S. ___, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985), your Honorable Court granted certiorari and reversed the decision of an appellate court in a discrimination case for misapprehension and misapplication of the clearly-erroneous standard by which a Court of Appeals is supposed to review the factual findings of a District Court. (Federal Rule of Civil Procedure 52.) The present case is another such case, warranting similar treatment.

Appellants agree that respondent's application to the School required individual evaluation, and could not be rejected simply

because respondent has Crohn's disease.

Appellants submit, however, that the evidence presented at trial shows that the School's Student Health Physician, Dr. Crary, in fact evaluated respondent's application individually, rejecting it only because of the severity of respondent's particular disability at the time of evaluation.

There was no dispute that Dr. Crary had consulted Dr. Ament, respondent's personal physician, after analyzing the written data supplied by respondent and Dr. Ament. That consultation belies the contention that respondent's application was not evaluated individually. Had Dr. Crary determined to reject the application because of the mere presence of Crohn's disease, he would not have consulted any other physician about the particulars of respondent's recent hospitalizations or been concerned as to the nature of her medications. Yet the trial record is

undisputed as to the existence of those consultations and concerns, as set forth in our STATEMENT OF THE CASE.

Respondent's argument that Dr. Crary made his decision without enough information is easily answered. The additional information was within the knowledge of respondent and her personal physician. They should have supplied it. Dr. Ament could easily have done so, as he spoke with Dr. Crary about the application before Dr. Crary made up his mind. If respondent does not believe that Dr. Crary asked all of the right questions, it was because she and her doctor had not given him enough facts to raise those questions.

Appellants submit that the undisputed evidence at trial supports the findings and resulting conclusions of the District Court;[2/]

[2/] To the extent that there were any credibility issues, they were to be resolved by the trial court. U.S. V. Oregon State Medical Society, 343 U.S. 326; 96 L.Ed. 978, 988; 72 S.Ct. 690 (1952). The admissions that respondent and

(cont. p. 20)

and that, in reversing the District Court, the Ninth Circuit misapprehended and misapplied the clearly-erroneous standard ordained by Federal Rule of Civil Procedure 52. Actually, it is the Ninth Circuit's own view of the trial evidence which is clearly erroneous.

Accordingly, your Honorable Court should issue a writ of certiorari to reverse the decision of the Ninth Circuit and reinstate the decision of the District Court.

DATED: August 20, 1985

Respectfully submitted,

DE WITT W. CLINTON
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By: JOE BEN HUDGENS
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2/ (cont.)
Dr. Ament had collaborated on submitting an incomplete medical history for Dr. Crary's evaluation might well cause the trial court to discount their testimony.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 16 1985
PHILLIP B. WINBERRY
Clerk,USCA

MARY L. KLING,	)	
	)	
Plaintiff-Appellant,	)	
	)	CA No. 83-6193
vs.	)	DC No. CV 79-2615-LTL
	)	
COUNTY OF LOS ANGELES, et al.,	)	ORDER *
	)	
Defendants-Appellees.	)	
	)	

Before: FLETCHER and CANBY, Circuite Judges, and SOLOMON,* District Judge.

IT IS ORDERED that the memorandum disposition filed on June 18, 1985 is withdrawn, and the attached memorandum disposition is ordered filed in substitution for that memorandum. The court's mandate issued on July 12, 1985 is recalled.

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUL 16 1985
PHILLIP B. WINBERRY
Clerk, USCA

MARY L. KLING, Plaintiff-Appellant, vs. COUNTY OF LOS ANGELES, et al., Defendants-Appellees.	CA No. 83-6193 DC No. CV 79-2615-LTL MEMORANDUM **

Appeal from the United States District Court
for the Central District of California
Hon. Lawrence T. Lydick, District Judge, Presiding
Argued and submitted May 14, 1985 at San Francisco

Before: FLETCHER and CANBY, Circuit Judges,
and SOLOMON,* District Judge.

This case is again before this court on Mary Kling's appeal from the judgment of

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

**The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit, save as provided by Rule 21(c).

the district court which denied her relief. The district court held that she was properly denied admission to the Los Angeles County Medical Center School of Nursing and denied her damages. We reverse and remand for calculation of damages and fees.

Facts

Appellant, Mary Kling, suffers from Crohn's Disease. Crohn's Disease is an inflammatory bowel disease which results in loss of weight, nausea, vomiting, headaches, and acute abdominal pain. In February, 1979, Kling applied for admission to the Los Angeles County Medical Center School of Nursing (School of Nursing). In April, she received a letter which admitted her to the school, and she attended an orientation session for new students. Two days before classes began, she was told that her physical examination results were not acceptable, and she was

rejected from the program.

Kling filed this action against the County of Los Angeles, the School of Nursing, and various individuals. She sought a preliminary injunction to permit her to attend the school. The district court denied Kling relief because she had not exhausted her administrative remedies.

Kling appealed. Based on an examination of deposition testimony and declarations of witnesses, we held that the School of Nursing rejected Kling because of her Crohn's Disease and that she had shown a likelihood of success on the merits. We reversed and remanded the case to the district court for it to grant a preliminary injunction. Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I).

Kling attended nursing school at Pierce Community College for one and one-half years while her case was litigated. On remand, the

School of Nursing offered to admit her into its program, but it refused to accept any of Kling's credits from Pierce College. Kling declined the school's offer and continued this action for damages and attorney's fees.

On remand, the district court found that Kling was not denied admission to the School of Nursing solely because of her Crohn's Disease but because she was academically deficient. It also found that the School of Nursing's physician rejected Kling because the program would be too stressful for her and that the physician's decision was binding on the school's admission committee. It held that Kling was not a handicapped person under the Rehabilitation Act and that she was not discriminated against under 42 U.S.C. § 1983 or section 504 of the Rehabilitation Act. Finally, it found that Kling did not suffer any compensable harm

because of her rejection.

Discussion

The trial in the district court did not produce substantially different evidence from that which we considered in Kling I. The district court's findings are clearly erroneous and in many instances are inconsistent. We find that Mary Kling is an "otherwise qualified handicapped individual" within the meaning of section 504 of the Rehabilitation Act[1] and that she was denied admission to the School of Nursing solely because of her handicap.[2] The school's

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[1] 29 U.S.C. § 794. See 34 C.F.R. § 104.3(j).

[2] The School of Nursing's claim that Kling was not otherwise qualified because she failed to meet the mathematical entrance requirement is meritless. Because Kling was rejected solely because of her handicap and because this decision was made without regard to her mathematical deficiency and before she had an opportunity to submit evidence that she had or had not remedied the deficiency, it is irrelevant that the deficiency may have existed.

physician, Dr. Crary, rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been "swayed very strongly toward acceptance." It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid. See Bentivegna v. United States Department of Labor, 694 F.2d 619 (9th Cir. 1982); Pushkin v. Board of Regents of the University of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981). The district court's legal conclusions are similarly erroneous.

Damages are an appropriate remedy under the Rehabilitation Act. See Consolidated Rail Corp. v. Darrone, 104 S.Ct. 1248 (1984) (back pay); Meiner v. Missouri, 673 F.2d 969

(8th Cir.), cert. denied, 459 U.S. 909 (1982). This is particularly true where injunctive relief, already awarded in Kling I, will not remedy the harm. See, e.g., Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 949 (D.N.J. 1980).

We reverse the judgment of the district court and remand the case for the entry of a judgment in favor of Kling and for the assessment of damages and attorney fees in her favor.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JUN 18
1985
PHILLIP B.
WINBERRY
Clerk,USCA

MARY L. KLING, Plaintiff-Appellant, vs. COUNTY OF LOS ANGELES, et al., Defendants-Appellees.	CA No. 83-6193 DC No. CV 79-2615-LTL MEMORANDUM **

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for the Central District of California
Hon. Lawrence T. Lydick, District Judge, Presiding
Argued and submitted May 14, 1985 at San Francisco

Before: FLETCHER and CANBY, Circuit Judges,
and SOLOMON,* District Judge.

This case is again before this court on Mary Kling's appeal from the judgment of

*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

**The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit, save as provided by Rule 21(c).

the district court which denied her relief. The district court held that she was properly denied admission to the Los Angeles County Medical Center School of Nursing and denied her damages. We reverse and remand for calculation of damages and fees.

Facts

Appellant, Mary Kling, suffers from Crohn's Disease. Crohn's Disease is an inflammatory bowel disease which results in loss of weight, nausea, vomiting, headaches, and acute abdominal pain. In February, 1979, Kling applied for admission to the Los Angeles County Medical Center School of Nursing (School of Nursing). In April, she received a letter which admitted her to the school, and she attended an orientation session for new students. Two days before classes began, she was told that her physical examination results were not acceptable, and she was

rejected from the program.

Kling filed this action against the County of Los Angeles, the School of Nursing, and various individuals. She sought a preliminary injunction to permit her to attend the school. The district court denied Kling relief because she had not exhausted her administrative remedies.

Kling appealed. Based on an examination of deposition testimony and declarations of witnesses, we held that the School of Nursing rejected Kling because of her Crohn's Disease and that she had shown a likelihood of success on the merits. We reversed and remanded the case to the district court for it to grant a preliminary injunction. Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I).

Kling attended nursing school at Pierce Community College for one and one-half years while her case was litigated. On remand, the

School of Nursing offered to admit her into its program, but it refused to accept any of Kling's credits from Pierce College. Kling declined the school's offer and continued this action for damages and attorney's fees.

On remand, the district court found that Kling was not denied admission to the School of Nursing solely because of her Crohn's Disease but because she was academically deficient. It also found that the School of Nursing's physician rejected Kling because the program would be too stressful for her and that the physician's decision was binding on the school's admission committee. It held that Kling was not a handicapped person under the Rehabilitation Act and that she was not discriminated against under 42 U.S.C. § 1983 or section 504 of the Rehabilitation Act. Finally, it found that Kling did not suffer any compensable harm

because of her rejection.

Discussion

The trial in the district court did not produce substantially different evidence from that which we considered in Kling I. The district court's findings are clearly erroneous and in many instances are inconsistent. We find that Mary Kling is an "otherwise qualified handicapped individual" within the meaning of section 504 of the Rehabilitation Act[1] and that she was denied admission to the School of Nursing solely because of her handicap.[2] The school's

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[1] 29 U.S.C. § 794. See 34 C.F.R. § 104.3(j).

[2] The School of Nursing's claim that Kling was not otherwise qualified because she failed to meet the mathematical entrance requirement is meritless. Because Kling was rejected solely because of her handicap and because this decision was made without regard to her mathematical deficiency and before she had an opportunity to submit evidence that she had or had not remedied the deficiency, it is irrelevant that the deficiency may have existed.

physician, Dr. Crary, rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been "swayed very strongly toward acceptance." It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid. See Bentivegna v. United States Department of Labor, 694 F.2d 619 (9th Cir. 1982); Pushkin v. Board of Regents of the University of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981). The district court's legal conclusions are similarly erroneous.

Damages are an appropriate remedy under the Rehabilitation Act. See Consolidated Rail Corp. v. Darrone, 104 S.Ct. 1248 (1984) (back pay); Meiner v. Missouri, 673 F.2d 969

(8th Cir.), cert. denied, 459 U.S. 909 (1982). This is particularly true where injunctive relief, already awarded in Kling I, will not remedy the harm. See, e.g., Poole v. South Plaintifield Board of Education, 490 F.Supp. 948, 949 (D.N.J. 1980).

We reverse the judgment of the district court and remand the case for the entry of a judgment in favor of Kling and for the assessment of damages and attorney fees in her favor. We direct that this case be assigned to another judge for a determination of damages and fees.

Ordinarily, further proceedings in a case remanded to the district court are conducted by the judge who originally tried the case. But, on rare occasions, for both the judge's sake and the appearance of justice, an assignment to a different judge is desirable. Absent personal bias, which we do not find here, the remand does not imply any

personal grievance against the judge.

Here, the original judge may have difficulty in ridding himself of previously expressed views. He found that Kling was not a disabled person. He also found that her testimony, particularly on the issue of her physical and mental disabilities, was not credible. He made other findings which are directly contrary to the findings we made in Kling I and in the present appeal. These findings undermine the judge's appearance of impartiality, particularly when the remand is limited to the assessment of damages and fees based on our findings of fact and conclusions which are in direct conflict with his.

A remand to a different judge is particularly feasible here because the issues to be decided by the new judge are narrow, and any duplication of effort resulting from the new assignment will be minimal. See

United States v. Ferguson, 624 F.2d 81, 82-83 (9th Cir. 1980).

The judgment of the district court is REVERSED and the action REMANDED for proceedings consistent with this decision.

APPENDIX C

633 F.2d 876

Mary L. KLING, Appellant,

v.

COUNTY OF LOS ANGELES; Los Angeles County Medical Center School of Nursing; Gerald C. Crary, M.D., as head of the Admissions Committee of Los Angeles County Medical Center School of Nursing; Mary Duncan, R.N., as Registrar and Head of Recruitment for Los Angeles County Medical Center School of Nursing; Foteen O'Connor, as Chief Administrative Director of Los Angeles County Medical Center School of Nursing; Paul Drozd, as Deputy Administrative Director of Los Angeles County Medical Center School of Nursing, Appellees.

No. 80-5371.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Oct. 7, 1980.

Decided Dec. 8, 1980.

Plaintiff, claiming discrimination against her as handicapped person, was denied preliminary injunctive relief by the United States District Court for the Central

District of California, Lawrence T. Lydick, J. Plaintiff appealed. The Court of Appeals, Solomon, Senior District Judge, held that: (1) Rehabilitation Act section prohibiting discrimination against handicapped in programs or activities receiving federal financial assistance provides private right of action; (2) administrative remedies for enforcement of such statute are inadequate, and exhaustion is not required; and (3) Plaintiff showed probable success on the merits.

Reversed and remanded with direction to grant preliminary injunction.

1. Action

Rehabilitation Act section prohibiting discrimination against handicapped in programs or activities receiving federal financial assistance provides private right of action. Rehabilitation Act of 1973, § 504 as

amended 29 U.S.C.A. § 794.

2. United States

Administrative remedies for enforcement of Rehabilitation Act section prohibiting discrimination against handicapped in programs or activities receiving federal financial assistance are inadequate, and exhaustion is not required. Rehabilitation Act of 1973, § 504 as amended 29 U.S.C.A. § 794; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.,; Education Amendments of 1972, § 901, et seq., 20 U.S.C.A. § 1681 et seq.

3. Civil Rights

Plaintiff, denied admission to county school of nursing merely because she was suffering from Crohn's disease, showed probable success on merits of her cause of action for discrimination, and was entitled to preliminary injunction alloweing her to

enter school. Rehabilitation Act of 1973, §§ 7(7), 504 as amended 29 U.S.C.A. §§ 706(7), 794; Civil Rights Act of 1964, § 601 et seq., 42 U.S.C.A. § 2000d et seq.

Stanley Fleishman, Beverly Hills, Cal., for appellant.

Alan K. Terakawa, Los Angeles, Cal., for appellee.

Appeal from the United States District Court for the Central District of California.

Before FLETCHER and CANBY, Circuit Judges, and SOLOMON, District Judge.*

SOLOMON, Senior District Judge:

Mary Kling, who suffers from Crohn's disease, appeals from the district court's stay of her proceedings pending exhaustion of administrative remedies and from a denial of her motion for a preliminary injunction to allow her to attend the Los Angeles County School of Nursing (School) pending a trial of her action against the School.

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*Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

She seeks relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

FACTS

Kling is afflicted with Crohn's disease. In February 1979, she applied for admission to the School. In April 1979, she received a letter admitting her. At the School's invitation, she attended an orientation session where she was told to order uniforms and to purchase textbooks for the summer session. But, after a School doctor examined her, the School informed her that she could not enroll.

Kling complained to HEW but when she brought this action in the district court, HEW closed its files. In her action filed in July 1979, she alleged that the School violated Section 504 when solely because of her handicap the School refused to admit her to

its nursing program. She sought declaratory and injunctive relief and also a preliminary injunction requiring the School to admit her for the Spring semester. The district court denied the motion because she had not exhausted her administrative remedies.

In this appeal, we will only consider Kling's claims under the Rehabilitation Act of 1973 (the Act). Section 504 of that Act provides:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

Kling is a handicapped individual as defined by the Act. 29 U.S.C. § 706(7). The School's nursing program receives federal financial assistance.

PRIVATE RIGHT OF ACTION

Kling must first establish that there is a private right of action under Section 504. This issue is one of first impression in this court.[1] But all the other circuits that have considered this issue have held that there is such a right of action. Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980); NAACP V. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)[2]; Leary v. Crapsey, 566 F.2d 863

1. Two district courts in the Ninth Circuit have held that such a right exists. Upshur v.Love, 474 F.Supp. 332 (N.D.Cal. 1979); Boxall v. Sequoia Union High School District, 464 F.Supp. 1104 (N.D.Cal. 1979).

2. The Supreme Court expressly declined to decide this question. 442 U.S. at 404-05 n.5, 99 S.Ct. at 2366-67 n. 5. But see Campbell v. Kruse, et al., 434 U.S. 808, 98 S.Ct. 38, 54 L.Ed.2d 65 (1977), in which the Court vacated and remanded a district court

(cont. p. C-8)

(2d Cir. 1977); United Handicapped Federation v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277 (7th Cir. 1977).

In Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), the Supreme Court set forth four criteria for determining whether a private remedy is implicit in a statute which does not expressly provide for one.

> "First, is the plaintiff 'one of the class for whose esqpecial benefit the statute was enacted'--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to

---

2. (cont.)

decision that partial tuition grants to handicapped children denied equal protection. The Court directed the district court to decide the case based on Section 504, thus suggesting that a private right of action exists under the statute.

deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"

Id. at 78, 95 S.Ct. at 2087 (citations omitted).

[1] We agree with the application of the Cort test to Section 504 the court made in Lloyd v. Regional Transportation Authority, supra. There the court found that both the legislative history of the Rehabilitation Act and the analogy to Title VI of the Civil Rights Act of 1964, as interpreted in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L. Ed.2d 1 (1974 supports the existence of such

a right.[3]

We therefore hold that Kling has a private right of action under Section 504 of the Rehabilitation Act of 1973.

EHAUSTION OF REMEDIES

[2] The district courtheld that it was necessary that Kling exhaust her administrative remedies before she could maintain this action.

---

3. The Senate Labor and Public Welfare Committee stated that Section 504 was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Title IX of the Education Amendments of 1972, S.Rep. 93-1297, 93d Cong. 2d Sess. [1974]. [1974] U.S.Code Cong. & Ad. News, pp. 6373, 6390. Ten months before the Senate Report was submitted the Supreme Court held that Title VI created a private right of action. Lau v. Nichols, 414 U.S. 563, 566, 94 S.Ct. 786, 788, 39 L.Ed.2d 1 (1974). Further the Report stated that implementation of Section 504 "would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action." [1974] U.S.Code Cong. & Ad. News, pp. 6390-91.

The Section 504 regulations, 45 C.F.R. § 84.61, adopt the enforcement procedures of Title VI of the Civil Rights Act of 1964, 45 C.F.R. §§ 80.6-80.10. The same procedures were adopted to enforce Title IX of the Education Amendments of 1972, 45 C.F.R. §86.71. In Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court held that the exhaustion of Title IX administrative remedies is not required before one files a private action because the procedurs do not afford individual complainants adequate relief. Id. at 706-08 n. 41, 99 S.Ct. at 1962-63 n. 41. The administrative procedures under Section 504 are the same as those under Title IX. We therefore hold that the Section 504 remedies are inadequate and that exhaustion is not required.[4]

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4. See Camenisch v. University of Texas, 616 F.2d 127, 135 (5th Cir. 1980) in which

(cont. p. C-11)

PRELIMINARY INJUNCTION

[3] The grant or denial of a preliminary injunction will be overturned on appeal only if there has been an abuse of discretion by the district court. Benda v. Grand Lodge of the International Association of Machinists & Aerospace Workers, 584 F.2d 308, 314 (9th Cir. 1978), cert. dismissed 441 U.S. 937, 99 S.Ct. 2065, 80 L.Ed.2d 667 (1979), unless the district court relied on an erroneous legal premise. Douglas v. Beneficial Finance Co. of Anchorage, 469 F.2d 453, 454 (9th Cir. 1972). Here, the district court held that Kling was not entitled to any relief because she had not exhausted her administrative remedies. This is an erroneous legal premise.

A party who seeks a preliminary injunction must demonstrate both probable success on the merits and the possibility of irreparable injury. In the alternative the party

may show that the case raises serious questions and that the balance of hardships tips in his favor. William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 ((9th Cir. 1975).

Section 504 prohibits discrimination against "otherwise qualified handicapped individuals." In Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), the Supreme Court held that a deaf student was not able to meet all of the requirements of a clinical nursing program because the ability to understand speech without reliance on lipreading was necessary for a patient's safety during the clinical phase of the program. The Court also held that the school was not required to make the extensive modifications in its curriculum that a deaf student would require. But the Supreme Court did state that as a general proposition that "[a]n otherwise

qualified person is one who is able to meet all of a program's requirements in spite of his handicap" Id. at 406, 99 S.Ct. at 2363, that means "possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." Id. at 405, 99 S.Ct. at 2366.

Here the School does not contend that Kling is unable to meet its requirements. It asserts, however, that because of her condition she will miss an excessive number of classes. Kling's physician, Dr. Ament, stated that this was not true, and that she has demonstrated her ability to adequately participate in required school programs. Dr. Ament also stated that Kling's need for hospitalization can be avoided but if necessary it can be scheduled to minimize interference with hernursing school work. The School assumed that merely because Kling has Crohn's disease, her health was not

sufficiently sound and stable to successfully complete the program even though Dr. Gerald C. Crary, the head of the admissions committee, indicated that if Kling had been evaluated on an individual basis the School would have allowed her to enroll. In our view, Kling has shown a probability of success on the merits.

In addition, the balance of hardships tips in Kling's favor. The School has an outstanding reputation. Its graduates are among the best trained and have increased career opportunities. More than a year has passed since Kling was denied admittance to the School based on generalized assumptions about her physical health. The School will suffer no hardship from admitting Kling pending the outcome of the underlying litigation.

This is a much different case from King v. Saddleback Junior College District, 425 F.2d 426 (9th Cir. 1970), the case on which the School relies. There the students who

challenged a school dress code on hair length had the ability to comply with the school's requirements by merely changing their hair-style or by wearing a head band. Here Kling has no such opportunity and she will continue to be deprived of the opportunity to attend the School unless this court orders it.

Kling is entitled to a preliminary injunction ordering the Appellees to admit her to the Los Angeles County Medical Center School of Nursing for the semester beginning January, 1981.

The judgment below is reversed and this case is remanded to the district court with the direction to grant the preliminary injunction forthwith so that Appellant can enter the School with the January class. No petition for rehearing will be entertained and the mandate shall issue forthwith.

APPENDIX D

FILED
AUG 10 1983
Clerk, U.S.D.C.
C.Dist. of Calif.
By (init.) Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARY L. KLING,

Plaintiff,

v.

COUNT OF LOS ANGELES; UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING; LOS ANGELES COUNT/UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING; GERALD C. CRARY, M.D., as head of the Admission Committee of LOS ANGELES COUNTY/UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING; MARY DUNCAN, RN, as Registrar and head of recruitment for LOS ANGELES COUNTY/UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING; FOTEEN O'CONNOR, as Chief Administrative Director of LOS ANGELES COUNTY/ UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING; PAUL DROZD, as Deputy Administrative Director of LOS ANGELES COUNTY/UNIVERSITY OF SOUTHERN CALIFORNIA MEDICAL CENTER SCHOOL OF NURSING,

Defendants.

NO. CV 79-2615-LTL (Sx)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This is an action where the matter in controversy exceeds the sum or value of $10,000.00 exclusive of interest and costs and arises under the Constitution and laws of the United States.

2. Plaintiff was at all times herein mentioned a resident of the County of Los Angeles, State of California. Defendant County of Los Angeles was at all times herein mentioned a County in the State of California duly organized and existing under the laws of the State of California. Defendant County of Los Angeles owns and operates the Los Angeles County Medical Center School of Nursing. Defendants Gerald C. Crary, M.D., Mary Duncan, R.N., and Fotine O'Connor, at all times herein mentioned were employees of the Los Angeles county Medical Center School of Nursing and of the County of Los Angeles. Defendant Paul Drozd was at all

times herein mentioned the Executive Director of the Los Angeles County, University of Southern California Medical Center and an employee of the County of Los Angeles.

3. Defendant County of Los Angeles receives federal financial assistance from the federal government to conduct the nursing program here involved.

4. Plaintiff at all times herein mentioned suffered from Crohn's disease, an inflamatory bowel disorder involving the digestive tract which prevents passage and absorption of food and causes in plaintiff unpredictable episodes of nausea, vomiting, fever, headaches, loss of weight and acute abdominal pain among other things and which can require rest, medication, treatment and hospitalization.

5. On or about January 22, 1979, plaintiff applied for admission to the Los Angeles County Medical Center School of

Nursing (the "School").

6. Among other things, applicants to the School are required to pass a battery of tests including tests in reading and mathematics at the 13th grade level or above. Plaintiff scored at the 11.5 grade level on the mathematic portion of the test. She was advised on March 20, 1979 of her failure in this regard.

7. Plaintiff's application was considered by the Admissions Committee of the School on April 5, 1979. Her acceptance academically by the School was conditional due to her failure to achieve a passing score in mathematics. She was advised that remedial work in mathematics would be required until she obtained the 13th grade level in that area, and that documentation fo such attainment would be required before she would be considered acceptable for enrollment. No documentation of such attainment

was ever provided to the School.

8. The semester for which plaintiff made application was to commence June 13, 1979. Although she was advised that certain required medical information and reports had to be submitted by April 30, 1979, submission of such material was not made until on or about June 8, 1979.

9. The medical history and report portion of plaintiff's application was reviewed by defendant Gerald C. Crary, M.D., who at all times herein mentioned was the Student Health Physician at the School and was assigned to review and evaluate medical information submitted by School applicants and such applicants' health. The medical history and report portion of plaintiff's application were reviewed by him.

10. In addition to reviewing plaintiff's file, Dr. Crary spoke with plaintiff's personal physician Dr. Marvin Ament, consulted

with a gastroenterologist at Los Angeles County-USC Medical Center and consulted with Dr. Gail Anderson of Los Angeles County-USC Medical Center. The record reflected that in the ten months preceding Dr. Crary's review, plaintiff had been hospitalized four times for Crohn's disease, although plaintiff only reported three hospitalizations. The most recent hospitalization, at or about the time plaintiff completed her medical history form, was for eight days, a period admittedly longer than hospitalizations characterized by plaintiff's physician as being normal. It also reflected that plaintiff was receiving a steroid medication during the application period. Psychiatric treatment had also been received by plaintiff during a period beginning in October 1978 for shaking, seating, difficulty concentrating and sleeping disturbances and an anti-depressant had been prescribed for plaintiff by her psychiatrist.

11. The Student Nursing Program at the School is an intensive and demanding full time program which is both physically and emotionally demanding and stressful. Student nurses at the School are exposed to contagious and infectious diseases in the course of their clinical training. Manifestation, exposure, flareups and episodes of Crohn's disease can be aggravated by stress and steroid medication can lessen a person's resistance to disease and infection.

12. In Dr. Crary's medical opinion, the School program was too stressful for plaintiff at the time of his review of her application. Other physicians consulted by Dr. Crary agreed with this opinion. His rejection of plaintiff as a candidate for the School on June 11, 1979 was for health reasons, because he believed it was unlikely she could complete the rigorous program and because he believed her health would be

endangered if she attempted to complete the program. His recommendation that she enroll in a less rigorous and demanding community college nursing program was concurred in by her own physician.

13. Neither the Admissions Committee nor Mary Duncan, Registrar, had the authority to overrule Dr. Crary's medical decision.

14. An applicant who suffers from Crohn's disease or any other chronic disability which could be defined as a handicap is not automatically denied admittance to the School. Applicants with chronic disabilities which could be defined as handicps have been admitted to the School when it was determined that the manifestations or symptoms of such chronic disabilities were sufficiently under control at the time of evaluation or would not prevent the applicant from fully participating in the School's curriculum.

15. Had plaintiff entered the School on June 13, 1979, she would have graduated at the earliest in June, 1981. Plaintiff completed a nursing program at Pierce College in June, 1981. Her failure to be admitted by the School had no effect upon her acceptance at Pierce College or any other nursing program to which she applied. She took and passed the state licensing examination to become a registered nurse in July, 1981, and is currently employed as a registered nurse.

16. Plaintiff has failed to show that she is a person who has a physical or mental impairment which substantially limits one or more of her major life activities, or has a record of such impairment or is regarded as having such an impairment.

17. Plaintiff has failed to show that she was otherwise qualified for admission to the School.

18. Plaintiff has failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease.

19. Plaintiff has failed to show any conspiracy between defendants or any of them to deprive her of any rights under the Constitution or under 42 U.S.C. § 1985(3) or 1986 or under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, or any acts in furtherance of any conspiracy.

20. Plaintiff's inability to attend or graduate from the School has had no detrimental effect upon her professional development to date and any future detriment is purely speculative. No position which plaintiff sought was denied to her due to her inability to attend the School, nor could she have obtained any position which she sought at an earlier time or at a higher salary had she graduated from the School.

21. The Court regretfully finds that the testimony of plaintiff in a number of areas, and particularly in those related to the submission and content of her medical history and her claimed physical and emotional damage, was not credible.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331(a), 28 U.S.C. § 1343(4), 29 U.S.C. § 794, 42 U.S.C. §§ 1983, 1985(3) and 1986.

2. Plaintiff at the time of her application to the School was not an otherwise qualified handicapped person within the meaning of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

3. Plaintiff was not denied admission to the School solely by reason of her affliction with Crohn's disease or otherwise subjected to discrimination under any program

or activity which receives or benefits from federal financial assistance.

4. Defendants and none of them acted unreasonably or otherwise in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

5. Plaintiff had no legitimate claim of entitlement to enrollment in the School.

6. Defendants acting under color of law or pursuant to an official policy or practice or otherwise, did not arbitrarily exclude plaintiff from the School or its program in violation of due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution or discriminate against her under 42 U.S.C. § 1983 or Section 504 or otherwise. The decision to reject her application was reached after separate and individual review of her medical history and record as well as her other qualifications and was neither arbitrary

nor capricious.

7. Defendants did not conspire to deprive plaintiff of her federal Constitution or statutory rights under 42 U.S.C. § 1985(3) or 1986 or otherwise and did not violate those provisions of law in any manner whatsoever.

8. Plaintiff suffered no harm compensable in either compensatory or punitive damages as a result of any denial of admission to the School.

9. Any finding of fact made herein which is more properly deemed to be a conclusion of law shall be deemed a conclusion of law, and any conclusion of law made herein which may be more properly deemed a finding of fact shall be deemed a finding of fact.

Let judgment be entered accordingly.

DATED: This (9) day of August, 1983.

Lawrence T. Lydick
United States District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-295 (2)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUNTY OF LOS ANGELES, et al,

Petitioners,

v.

MARY L. KLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit correctly held that the district court's findings are clearly erroneous and inconsistent in many instances.

PARTIES

The Petition for Writ of Certiorari accurately sets forth the parties involved in the proceeding.

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No. 85-295

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

COUNTY OF LOS ANGELES, et al,

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v.

MARY L. KLING,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FACTS

1. Respondent Mary Kling has Crohn's disease. In February 1979 she applied for admission to the Los Angeles County School of Nursing ("school"). In April 1979, she received a letter admitting her. At the school's

invitation, she attended an orientation session where she was told to order a uniform and to purchase textbooks for the summer session. School was to begin June 13, 1979. On June 11, 1979 - one day after this Court decided Southeastern Community College v. Davis, 442 U.S. 397 (1979) - Kling was told that she was rejected from the program, because of her physical condition.

Kling filed a complaint in the United States District Court for the Central District of California, claiming that the school had discriminated against her in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and seeking a preliminary injunction to permit her to attend the school. The district court ruled that she was not entitled to any judicial relief because she had not yet exhausted her administrative remedies. The Court of Appeals for the Ninth Circuit reversed and remanded with directions to grant a preliminary injunction. Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980) (Kling I).

Kling attended nursing school at Pierce Community College for one and one-half years while her case was litigated. After the Ninth Circuit ruled in Kling I, petitioners agreed to admit Kling, but refused to accept any of her credits from Pierce College. Kling, not wanting to start from scratch, stayed at Pierce College, and received her nursing degree from that college. She continued her action for damages and attorneys fees.

2. On remand the district court held that Kling was not a handicapped person within the meaning of § 504 and that she was not discriminated against in violation of the Act. The Court of Appeals reversed, stating that the district court's findings were "clearly erroneous and in many instances . . . inconsistent." The Ninth Circuit noted that the school's physician, Dr. Crary rejected Kling because she suffers from Crohn's disease, assuming that the school's program would be too stressful for her. The court observed that Dr. Crary:

> did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been 'swayed very strongly toward acceptance.'

The Ninth Circuit held that it is precisely this type of "general assumption" about a handicapped person's ability, that § 50 condemned.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners' reliance on Anderson v. Bessemer City, 470 U.S. ___, 105 S.Ct. 1504 (1985) is misplaced. In the case at bar the Court of Appeals accurately applied Rule 52 of the Federal Rules of Civil Procedure. It correctly concluded that the district court's "findings" were internally inconsistent and clearly erroneous. Surely, the district court' "finding" that Kling was not a handicapped person within the meaning of § 504 (Finding 16, Appendix D - 42 to the Petition) is inconsisten with the "finding" that she was denied admissio to the school because the school physician

believed that the school's program "was too stressful" for her. Finding 12, Appendix D-40 to the Petition.

The "finding" that Kling is not a handicapped person within the meaning of § 504, was not supported by any subsidiary findings; in reality it is a conclusion of law. In rejecting this "finding" the Court of Appeals was merely correcting a legal error committed by the district court. As this Court noted in Pullman-Standard v. Swint, 456 U.S. 273, 287, the "clearly erroneous" rule does not apply to conclusions of law. The Court added:

> The court of appeals . . . was quite right in saying that if a district court's findings rest on an erroneous view of the law they may be set aside on that basis.

2. The Court of Appeals correctly undertook the burdensome task of reviewing the entire record. Anderson v. City of Bessemer, supra, 105 S.Ct. at 1515 (Justice Powell concurring). In this case, petitioner's story was so internally inconsistent and implausible

on its face that a reasonable fact finder would not credit it. See, United States v. United States Gypsum Co., 333 U.S. 364, 396. Having found that the district court's findings on the crucial issues were made under an erroneous view of controlling legal principles, the Court of Appeals was compelled to set the findings aside.

3. The district court's "findings" were properly subjected to close scrutiny because they were adopted verbatim from the findings of fact and conclusions of law prepared by petitioners herein, without guidance from the court. This Court has criticized courts for such conduct particularly where, as here, the findings have taken the form of conclusory statements unsupported by citation to the record. Anderson v. City of Bessemer, supra, 105 S.Ct. at 1511. The district court's crucial "findings" reflect the kind of "overreaching and exaggeration" on the part of attorneys which is disfavored. See J. Wright, The Non-Jury Trial - Preparing Findings of Fact, Conclusions of Law,

and Opinions, Seminars for Newly Appointed United States District Judges, 159, 166 (1962).

4. The Court of Appeals noted that based on an examination of deposition testimony and declarations of witnesses it had concluded in Kling I that the school of nursing rejected Kling because of her Crohn's disease. Appendix A-4 to the Petition. It further found that the evidence at trial was not substantially different from the evidence which it considered in Kling I. Appendix A-6 to the Petition. The Court of Appeals was left with the definite and firm conviction that a mistake had been made, and accordingly set aside the district court's findings as "clearly erroneous." United States v. United States Gypsum Co., supra, 333 U.S. at 395.

CONCLUSION

The Court of Appeals correctly concluded that the district court's findings were "clearly erronous" and "inconsistent in many instances." Accordingly the petition for a writ of certiorari should be denied.

DATED: September 30, 1985

Respectfully submitted,

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By: _____
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0658A Sys./0043A Arch.

DECLARATION OF SERVICE BY MAIL

I, declare as follows:

I am a citizen of the United States and a resident of the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067. On October 2, 1985, I served the within

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT - RESPONDENT'S BRIEF IN OPPOSITION

on the interested parties by placing a true copy thereof enclosed in a sealed envelope with first-class postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

DeWitt W. Clinton
County Counsel
Joe Ben Hudgens
Senior Deputy County Counsel
648 Hall of Administration
500 W. Temple Street
Los Angeles, California 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 30th day of September, 1985, at Los Angeles, California.

Vicki S. Butler
VICKI S. BUTLER

OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

COUNTY OF LOS ANGELES ET AL. *v.* MARY L. KLING

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–295. Decided November 4, 1985

The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed. *Anderson* v. *City of Bessemer City*, 470 U. S. —— (1985).

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See *Maggio* v. *Fulford*, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 51–52 (1982) (MARSHALL, J., dissenting).

JUSTICE STEVENS, dissenting.

Respondent is afflicted with Crohn's disease. Although originally accepted, her application for admission to the Los Angeles County School of Nursing was ultimately denied, at least in part, because of the school physician's opinion that the school program was "too stressful" for her. Finding of Fact No. 12, App. to Pet. for Cert. D–40. Nevertheless, the District Court concluded that respondent had "failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease." Finding of Fact No. 18, App. to Pet. for Cert. D–43. Based on this critical finding, the District Court denied respondent any relief under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794.

The Court of Appeals for the Ninth Circuit reversed. After reviewing the prior history of the case and explaining why it had previously reversed the District Court's order denying

respondent's motion for a preliminary injunction, the Court of Appeals wrote:

> "The trial in the district court did not produce substantially different evidence from that which we considered in *Kling I*. The district court's findings are clearly erroneous and in many instances are inconsistent. We find that Mary Kling is an 'otherwise qualified handicapped individual' within the meaning of section 504 of the Rehabilitation Act[1] and that she was denied admission to the School of Nursing solely because of her handicap.[2] The school's physician, Dr. Crary, rejected Kling because she suffers from Crohn's Disease. He assumed that merely because of her disease she would be unable to complete the school's program. He did not evaluate her on an individual basis and even testified that had he known more about Kling's medical history, he would have been 'swayed very strongly toward acceptance.' It is precisely this type of general assumption about a handicapped person's ability that section 504 was designed to avoid. *See Bentivegna* v. *United States Department of Labor*, 694 F. 2d 619 (9th Cir. 1982); *Pushkin* v. *Board of Regents of the University of Colorado*, 658 F. 2d 1372, 1385 (10th Cir. 1981). This district court's legal conclusions are similarly erroneous.
>
> "[1] 29 U. S. C. § 794. *See* 34 CFR § 104.3(j).
>
> "[2] The School of Nursing's claim that Kling was not otherwise qualified because she failed to meet the mathematical entrance requirement is meritless. Because Kling was rejected solely because of her handicap and because this decision was made without regard to her mathematical deficiency and before she had an opportunity to submit evidence that she had or had not remedied the deficiency, it is irrelevant that the deficiency may have existed." App. to Pet. for Cert. A–6–7.

As this Court's summary disposition today demonstrates, the Court of Appeals would have been well advised to discuss

the record in greater depth. One reason it failed to do so is that the members of the panel decided that the issues presented by this case did not warrant discussion in a published opinion that could be "cited to or by the courts of this circuit, save as provided by Rule 21(c)." App. to Pet. for Cert. at A–2, n. **. That decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong.[1]

The brevity of analysis in the Court of Appeals' unpublished, non-citable opinion, however, does not justify the Court's summary reversal. Presumably, the Court's reversal is not based on a view that the Court of Appeals misapprehended the governing standard: as the Ninth Circuit stated, findings of fact by the District Court are reviewable to determine if they are "clearly erroneous." Fed. R. Civ. P. 52(a). Apparently, the Court disagrees with the Ninth Circuit's application of that standard. However, the Court's reversal is not accompanied by a review of the District Court's factual findings or a determination that they are not, in fact, "clearly erroneous." The Court is thus spared the necessity of explaining the apparent inconsistencies in the District Court's findings.[2] The Court is also spared the ne-

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[1] The proliferation of this secret law has prompted extensive comment. See, *e. g.*, R. Posner, The Federal Courts (1985) 120–126; Wald, The Problem with the Courts: Black-robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766, 781–783 (1983); Reynolds & Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U. Chi. L. Rev. 573 (1981); Reynolds & Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Colum. L. Rev. 1167 (1978); Stevens, Address to the Illinois State Bar Association's Centennial Dinner, 65 Ill. Bar J. 508, 510 (1977). Cf. Grodin, The Depublication Practice of the California Supreme Court, 72 Cal. L. Rev. 514 (1984).

[2] Compare Finding of Fact No. 16, App. to Pet. for Cert. D–42 ("Plaintiff has failed to show that she is a person who has a physical or mental impairment which substantially limits one or more of her major life activities, or has a record of such impairment or is regarded as having such an impairment") with Finding of Fact No. 4, App. to Pet. for Cert. D–36

cessity of addressing the fact that the petitioners' own rendition of the incidents in question suggests that the District Court's findings give a less than complete accounting of certain events—events that may well influence a court's view of the matter at hand.[3]

Finally, the Court is spared the necessity of analyzing the District Court's factual findings in the context of the record.

("Plaintiff at all times herein mentioned suffered from Crohn's disease, an inflamatory [sic] bowel disorder involving the digestive tract which prevents passage and absorption of food and causes in plaintiff unpredictable episodes of nausea, vomiting, fever, headaches, loss of weight and acute abdominal pain among other things and which can require rest, medication, treatment, and hospitalization") and Finding of Fact No. 10, App. to Pet. for Cert. D–39. ("The record reflected that in the ten months preceding Dr. Crary's review, plaintiff had been hospitalized four times for Crohn's disease, although plaintiff only reported three hospitalizations.")

Compare also Finding of Fact No. 12, App. to Pet. for Cert. D–40 (Dr. Crary's "rejection of plaintiff as a candidate for the School on June 11, 1979 was for health reasons, because he believed it was unlikely she could complete the rigorous program and because he believed her health would be endangered if she attempted to complete the program") and Finding of Fact No. 13, App. to Pet. for Cert. D–41 ("Neither the Admissions Committee nor Mary Duncan, Registrar, had the authority to overrule Dr. Crary's medical decision") with Finding of Fact No. 18, App. to Pet. for Cert. D–43 ("Plaintiff has failed to show that she was denied admission to the School solely by reason of her affliction or because she had Crohn's disease.").

[3] Compare Finding of Fact No. 7, App. to Pet. for Cert. D–37 ("Plaintiff's application was considered by the Admissions Committee of the School on April 5, 1979. Her acceptance academically by the School was conditional due to her failure to achieve a passing score in mathematics.") with Pet. for Cert. at 4–5 ("In April, 1979, by mistake, respondent was given a letter unconditionally accepting her application, even though her score on a mathematics portion of the entrance examination was deficient, and even though she had not been cleared for admission by the School's Student Health Physician, Gerald C. Crary, M. D. . . . In an interview on April 20, 1979, the School's Registrar, Mary J. Duncan, told respondent that her acceptance was actually conditional on her presenting evidence of tutoring and testing to establish the requisite thirteenth-grade level of proficiency in mathematics concepts and problems, and on her passing the physical requirements.").

The absence of such an analysis is somewhat puzzling. The entirety of the majority's analysis is a reference to *Anderson* v. *Bessemer City*, No. 83–1623 (slip op. March 19, 1985). In that case, the Court found it necessary to review the record before it reversed the Court of Appeals' conclusion that the District Court's findings were clearly erroneous. *Ibid.*, at 10–15. The Court's refusal to undertake such a review for its summary disposition in the case before us is especially disturbing when it is recalled that, under current Court practice, the petitioner does not usually file the record with a petition for certiorari.[4]

In my judgment, this Court does not use its scarce resources wisely when it undertakes to engage in the *de novo* review of factual records in relatively routine litigation. Cf. *United States* v. *Hasting*, 460 U. S. 499, 516–518 (1983) (STEVENS, J., concurring in the judgment). When such review is necessary to a disposition, however, and the Court fails to provide it, the problems of this Court's review are still more troubling. For, like a Court of Appeals that issues an opinion that may not be printed or cited, this Court then engages in decision-making without the discipline and accountability that the preparation of opinions requires.[5]

I respectfully dissent from the Court's summary reversal.

JUSTICE BRENNAN dissents from the Court's summary reversal substantially for the reasons stated by JUSTICE STEVENS.

[4] See S. Ct. Rule 21; Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 13 (1983); R. Stern & E. Gressman, Supreme Court Practice (5th Ed.) (1978) 424–429.

[5] "In our law the opinion has in addition a central forward-looking function which reaches far beyond the cause in hand: the opinion has as one if not its major office to show how like cases are properly to be decided in the future. This also frequently casts its shadow before, and affects the deciding of the cause in hand. (If I cannot give a reason I should be willing to stand to, I must shrink from the very result which otherwise seems good.) Thus the opinion serves as a steadying factor which aids reckonability." K. Llewellyn, The Common Law Tradition 26 (1960), quoted in Reynolds & Richman, *supra* n. 2, 78 Colum. L. Rev. at 1204.